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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 224

FRED P. HAYWARD ET AL.

vs.

CITY OF CORPUS CHRISTI.

REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI.

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INDEX

SUBJECT INDEX

	Page
Reply to Petitioners' Summary Statement of Matter Involved	1-4
Reply to Reasons Relied On for Allowance of Writ	4-6
Argument:	
Reply to Point I	7-19
Reply to Point II	19-22
Reply to Point III	22-27
Reply to Point IV	27-28
Conclusion	29

TABLE OF CASES CITED

	Page
Board v. *T. & P. Ry Co.*, 46 Tex. 317	10
Buchanan v. *Litchfield*, 102 U. S. 278	25
Buie v. *Cunningham*, 29 S. W. 801	9, 10
Cameron County Water Improvement District v. *De la Vergne Engine Co.*, 93 Fed. (2d) 373	26
Carr v. *Terminal Co.*, 150 N. E. 262	25
Cavanaugh v. *Cavanaugh*, 238 S. W. 1023	15
Cavanaugh v. *Romberg*, 247 S. W. 909	15
City of Brenham v. *German American Bank*, 144 U. S. 178, 12 Sup. Ct. 559	10
City of Dayton v. *Allred*, 123 Tex. 60, 68 S. W. (2d) 172	4, 5, 20, 28
City of Hamlin v. *Brown Crummer Co.*, 93 Fed. (2d) 690, 303 U. S. 664	4, 5, 24, 27
City of San Antonio v. *McKenzie*, 88 S. W. (2d) 662	25
Citizens Bank v. *Terrell*, 14 S. W. 741	23
Columbus v. *Mercantile Trust Co.*, 218 U. S. 145	25
Compton v. *Stage Co.*, 25 Tex. Supp. 76	13
Dwyer v. *Hackworth*, 57 Tex. 251	10
Fisher v. *City of Bartlett*, 76 S. W. (2d) 535	9
G., C. & S. F. Ry. Co. v. *G., H. & S. A. Ry Co.*, 83	

Page
Tex. 509, 18 S. W. 956 17
Grimes County v. *W. L. Slayton & Co.*, 262 S. W. 209 23
Hernin v. *City of Coquille*, 21 Pac. (2d) 1078 26
Howell v. *Bartlett*, 19 S. W. (2d) 104 11
James v. *James*, 164 S. W. 47 17
Jones v. *Clark*, 250 S. W. 217 10
Ladonia State Bank v. *McDonald*, 7 S. W. (2d) 161 11
Lowe v. *City of Del Rio*, 122 S. W. (2d) 191 ..... 10, 11
May v. *Slade*, 24 Tex. 205 13
McCann v. *Akard*, 68 S. W. (2d) 1033 ..... 4, 5, 20, 28
McIver v. *Clark*, 10 Sou. 581 (Miss.) 25
M.-K.-T. Co. v. *Krumseig*, 172 U. S. 358, 19 Sup. Ct. 182 25
Moore v. *Snowball*, 98 Tex. 16 17
Morrill v. *Smith Co.*, 33 S. W. 899 10
Murray v. *City of Pocatello*, 226 U. S. 318 15
Nickelson v. *Ingram*, 24 Tex. 631 14
Ontario Land Co. v. *Wilfong*, 223 U. S. 543-559, L. Ed. 544-551, 32 Sup. Ct. 328 16
Philipowski v. *Spencer*, 63 Tex. 604-607 15
Pullman's, etc., Co. v. *Central, etc., Co.*, 171 U. S. 138 25
Radford v. *City of Cross Plains*, 86 S. W. (2d) 204 ..... 4, 5, 19, 23, 27
Rushing v. *Mayfield Co.*, 104 S. W. (2d) 619-622 13
Sandoval v. *Rosset*, 26 S. W. 932 2
Sewell, etc., Co. v. *Booth, etc., Co.*, 50 S. W. (2d) 793 2
Southwestern Lloyds v. *City of Wheeler*, 109 S. W. (2d) 739 23
State v. *Bank of Mineral Wells*, 251 S. W. 1107 10
Stratton v. *Commissioners' Court*, 137 S. W. 1170 10
Texas Electric & Ice Co. v. *City of Vernon*, 252 S. W. 255 10
Union, etc., Bank v. *Memphis*, 189 U. S. 71 1
Vann v. *Bank*, 204 S. W. 1062-1069 19
Womack v. *City of University Place*, 32 S. W. (2d) 930 9

STATUTES CITED

	Page
Texas Revised Civil Statutes 1925:	
Article 1111	20, 27, 28
Article 1112	20, 27, 28

TEXT BOOKS CITED

	Page
Bigelow on Estoppel, page 121	12
Corpus Juris, vol. 50, Sec. 50, Sec. 3, page 407	11
Corpus Juris, vol. 21, Sec. 153, page 176	26
Freeman on Judgments, Sec. 158	17
McQuillin on Municipal Corporations, vol. 3, 2d ed., Sec. 1283	25
Texas Jurisprudence, vol. 1, p. 155, Sec. 111; p. 127, Sec. 92	13
Texas Jurisprudence, vol. 26, Secs. 388, 397, pp. 87-88	15
Texas Jurisprudence, vol. 26, Sec. 460, p. 232	16
Texas Jurisprudence, vol. 26, Sec. 419, p. 137	17
Van Fleet's Former Adjudication, p. 569	17
Wells, Res Judicata, Sec. 466	15

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OCTOBER TERM, 1940

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vs.

CITY OF CORPUS CHRISTI.

REPLY BRIEF OF CITY OF CORPUS CHRISTI

Reply to Petitioners' Summary Statement of Matter Involved.

---

1. The petition for certiorari undertakes to fix jurisdiction principally on the ground that the Circuit Court of Appeals erred in refusing to apply the rule of res judicata as barring respondent's defense that the bonds involved are invalid. The effect of the State court's judgment in *Harris v. Flato*, which petitioners pleaded, in this action is, of course, a question of local law, *Union etc. Bank v. Memphis*, 189 U. S. 71. Petitioners rely on decisions of New York and other foreign courts. No Texas case is cited by petitioners and we re-

spectfully submit that none can be found which sustains their contention. On the contrary, the facts of this case fail to bring it within the application of the doctrine.

The prior judgment of the State court referred to by petitioners as the *Flato Case* was not between the same parties as here, or their privies. The bondholders were not parties to that suit. The court sustained exceptions of defendant trustees seeking dismissal of the suit for that reason. *Exceptions VIII* (R. 901), *LXII and LXIV* (R. 927, 928). Attempted service on unknown bondholders was quashed on motions of the trustee defendants and amicus curiae. (R. 945-946.) The court expressly held that the defendant trustees named in the deed of trust securing the bonds had no capacity to represent the bondholders (*Exception LX*, R. 926). Such ruling having been made at the solicitation of the defendants therein, petitioner is now estopped to deny its force. *Sewell etc. Co. v. Booth etc. Co.*, 50 S. W. (2d) 793.

Further, in that suit the City of Corpus Christi was not an adverse party to such trustees. It asked no relief against them (R. 117-119), and they sought none against it (R. 934). Such trustee defendants, aside from their exceptions, pleaded only a general denial to Harris' petition. The State court, at the instance of the trustee defendants, ruled that plaintiff Harris could neither represent the City nor sue it, and exceptions were sustained dismissing it from the case. *Exceptions XIII, XIIIa, and XIIIb* (R. 904-905).

The application for writ of error, by Harris alone, was dismissed by the Supreme Court *for want of jurisdiction* (R. 476), which at the utmost could mean no more than that the Supreme Court did not approve the opinion of the Court of Civil Appeals, but found its judgment that Harris could not sue to be correct.

The trustee defendants contended on appeal that the bondholders were necessary parties and that the demurrer was properly sustained for that reason (R. 956) and their reply to the application for writ of error presented the same contention with three others, none of which went to the validity of the bonds. (R. 958-961.)

In the *Flato Case* the trial court first sustained all special exceptions, approximately eighty in number, and then sustained the general demurrer (R. 472-474). Many of these special exceptions raised matters in abatement of the suit.

In addition to other rulings herein mentioned, by the sustention of the exceptions of the trustee defendants, the trial court adjudged that Harris could not sue as a taxpayer because the bonds were payable solely from water revenues, *Exceptions X, XI and XII* (R. 902-903); that the City had an adequate legal remedy, a defense to any suit upon the bonds, *Exception XVI* (R. 906); and that Harris was guilty of laches, *Exception LIX* (R. 926). These rulings and others were complained of on appeal. In its opinion the Court of Civil Appeals held Harris guilty of laches, and that he had no capacity to sue for damages, and afterwards held the bonds valid, which question it was wholly unnecessary to go into if Harris could not be heard, as stated in the opinion.

The trial court in this case did not decide that the judgment in the *Flato Case* was res judicata of the issues herein, but only that it estopped the City to assert the invalidity of the bonds (R.177-178).

2. Respondent respectfully submits that the Circuit Court of Appeals in this case did not refuse or fail to apply the law of Texas "as expounded by decisions of that State." Its

decision that the bonds are invalid is in accord with the judgment of the State courts in *Radford v. Cross Plains*, 126 Tex. 153, 86 S. W. (2d) 204; *City of Dayton v. Allred*, 123 Tex. 60, 68 S. W. (2d) 172; and *McCann v. Akard*, 68 S. W. (2d) 1033. It is also in accord with the earlier opinion of the Circuit Court of Appeals in *City of Hamlin v. Brown Crummer Co.*, 93 Fed. (2d) 690, certiorari denied 303 U. S. 664.

Petitioners would have those cases inapplicable because there the bonds were issued for "improvements" while those sued upon were for "additional water powers." But the facts here do not support such distinction, if any such is permissible.

The bonds in controversy were issued for the purpose, as stated in the contract, of "the construction of certain improvements to the waterworks system," and the bonds themselves recite as one of the purposes "to improve" the water system (R. 59-60). The ordinance for the 1927 bonds (R. 538) recites the necessity for certain "improvements and enlargements to the waterworks system" (R. 583). The word "improvements" appears in each bond ordinance (R. 628-670). By the deed of trust it was undertaken to create liens upon the then existing water system of the City, as well as upon the improvements and additions to be constructed. The improvements were so similar to those involved in the cases of *Radford v. City of Cross Plains*, 86 S. W. (2d) 204, and *City of Hamlin v. Brown Crummer Inv. Co.*, 93 Fed. (2d) 690, that no distinction can be made or is undertaken to be made.

Reply to Reasons Relied On for Allowance of Writ

1. The Circuit Court of Appeals applied the law as to

the merits of the controversy as established by the Supreme Court of Texas in the case of *Radford v. City of Cross Plains*, 126 Tex. 153, 86 S. W. (2d) 204, which is that Article 1112 of the Revised Statutes prohibits the encumbering of a water, sewer or light system by a city, for a debt in excess of Five Thousand Dollars ($5,000.00), except for extensions, unless such encumbrance is for the purchase money of the system covered by the encumbrance. Such decision is also supported by decisions of the Supreme Court Commission of Appeals in the cases of *City of Dayton v. Allred*, 123 Tex. 60, 68 S. W. (2d) 172, and *McCann v. Akard*, 68 S. W. (2d) 1033, and was followed by the Honorable Circuit Court of Appeals in the case of *City of Hamlin v. Brown Crummer Co.*, 93 Fed (2d) 690, certiorari denied April 11, 1938, 303 U. S. 664.

2. The Supreme Court of Texas did not approve the opinion of the Court of Civil Appeals in the *Harris-Flato* case. It dismissed the application for writ of error for want of jurisdiction.

3. The Circuit Court of Appeals did not err in applying as the law applicable to the case the latest decision of the Supreme Court of Texas directly in point as to the proper construction to be given Article 1112 of the Texas Revised Civil Statutes, as the same obtained at the time of the transactions in question.

4. The judgment in the case styled *W. F. Harris, Relator, v. Edwin Flato et al.*, and in the Court of Civil Appeals as *City of Corpus Christi, ex rel. W. F. Harris, v. Flato et al.*, is not res judicata of the issues involved herein, for reasons herein pointed out, but which may be briefly summarized as follows:

(*a*) The bondholders were not parties, and, as held by

the court in that case, they were indispensable and necessary parties, under the Texas decisions.

(*b*) The trustees in the deeds of trust were not in privity with the bondholders and could not and did not represent them, and it was so held by such court at the instance of the trustees.

(*c*) Said court sustained exceptions of the trustee defendants, prior to passing on the general demurrer, calling for dismissal of the City as a party defendant, and that Harris could not sue for the City.

(*d*) The City was not an adverse party to the trustee defendants. It made no issue against them and they made no issue against it.

(*e*) Such court, before passing on the demurrer, sustained exceptions of trustee defendants, each praying for a dismissal of the suit, wherein it was contended that there was a misjoinder of actions; that there was a nonjoinder of indispensably necessary parties, the bondholders; that Harris had no capacity to sue, and that Harris was guilty of laches.

5. The Supreme Court of Texas has never held that a city in an action at law against it on bonds is estopped to urge that they are void unless it tenders back the benefits received under the void contract. Furthermore, petitioners did not hold all of the outstanding bonds, nor did they have any alternative plea seeking to recover property, and the City did not ask for any equitable relief.

ARGUMENT

Reply to Point I.

The judgment in the *Harris v. Flato* case is not res judicata of the issues involved in this case. The judgment involved as one reciting the sustaining of all special exceptions to Harris' Fourth Amended Original Petition, and then reciting the sustaining of general demurrers, and then adjudging because of such rulings that the cause be dismissed (R. 472-474). Res judicata does not apply for each of the following reasons:

1. Harris attempted to make the bondholders parties by publishing citation, which service was quashed on motions of trustee defendants and amicus curiae (R. 945-946). The court sustained special exceptions of the trustee defendants before ruling on their general demurrer, calling for the dismissal of the suit on account of the absence of bondholders, who are indispensably necessary parties (R. 901). *Exception VIII* (R. 927), *Exceptions LXII and LXIV*. The point, of course, could be raised by special exception, and in *Buie v. Cunningham*, 29 S. W. 801, it was held it could be raised on general demurrer. The contention that the trustee defendants represented the bondholders is not supported by law, and ignores the fact that at the instance of the trustee defendants the court sustained their special exceptions calling for rulings that they did not and could not represent the bondholders (R. 926, *Exception LX*).

2. The court by sustaining special exceptions of the trustee defendants held that Harris could not sue for the City and that Harris could not sue the City. These exceptions prayed for dismissal of the City from the suit (R. 904-905, *Exceptions XIII, XIIIa and XIIIb*).

3. The City did not by its pleadings raise any issue as to the validity of the bonds (R. 117-119). The trustees did not sue the City, or ask for any relief against it. In fact, aside from exceptions, they only pleaded general denials to Harris' suit (R. 934).

The City was not an adverse party to the trustees.

4. The court sustained exceptions whereby the trustee defendants asked that Harris' suit be dismissed on the ground that there was a misjoinder of causes of action (R. 899-900, *Exceptions IV and V*); also on the ground that he had no capacity to maintain the suit as a taxpayer because the bonds were payable solely out of water revenue and plaintiff had no special interest (R. 902-903, *Exceptions X, XI and XII*); also on the ground of laches on Harris' part; also on the ground that even if the bonds should be held void, the City had an adequate legal remedy, to-wit, a valid defense to any suit that might be brought on the bonds and coupons (R. 906, *Exception XVI*).

Because of the rulings so made it affirmatively appears that the suit was dismissed on various grounds not going to the merits before the general demurrer was ever considered.

By sustaining *Exception XVII* (R. 906-907), all portions of the petition wherein it was alleged that Harris sued as relator for the City, or that the City sued on relation of Harris, were stricken. In fact, practically all of the petition was stricken on exceptions. The court then sustained a general demurrer and refused to allow Harris to amend (R. 472-474).

The City did not except to the judgment, nor to any ruling. It gave no notice of appeal and did not appeal. It

filed no brief. It assigned no errors. It had no pleadings to support any if it had, nor were any issues raised against it. Its pleading is stated in the Record, pages 117-119.

Harris alone appealed, and he alone applied for writ of error. On submission day the then City Attorney filed a motion in the Court of Civil Appeals, asking that the judgment be reversed, which motion was not docketed, nor was any order entered thereon. It could not affect the appeal or the rights of the parties to the suit.

It is certain that the Supreme Court not only did not hold the bonds valid, but further that it knew them to be invalid for at that very time it had been considering the *Radford v. Cross Plains* case for some months, and a week thereafter handed down its decision in that case holding void bonds issued under facts so similar to those here involved that they cannot be distinguished.

The Supreme Court might well have concluded that Harris had no capacity to sue. The case of *Fisher v. City of Bartlett*, 76 S. W. (2d) 535, and *Womack v. City of West University Place*, 32 S. W. (2d) 930, were called to its attention by the appellees in the *Flato Case*.

It might have concluded that laches existed as found by the Court of Civil Appeals.

It might have concluded that the bondholders were indispensably necessary parties, and that, therefore, the judgment dismissing the case was correct, as was held in the case of *Buie v. Cunningham*, 29 S. W. 801.

The trustee defendants contended on appeal that the bondholders were necessary parties, and the demurrer properly

sustained for that reason (R. 956), and their reply to the application for writ of error presented the same contention, with three others, none of which went to the validity of the bonds. (R. 958-961.)

Harris' application for writ of error was dismissed for want of jurisdiction, which could mean no more in any event than that the court found the judgment to be correct, but did not approve the opinion of the Court of Civil Appeals.

As the bondholders were not cited there was a lack of identity of parties in the *Harris Case* and the present. In the former the bondholders were necessary parties, and the court so held and adjudged at the instance of the trustee defendants. Respondent cites in this connection: *Lowe v. City of Del Rio*, 122 S. W. (2d) 191 (Sup. Ct.); *Morrill v. Smith County*, 33 S. W. 899; *Buie v. Cunningham*, 29 S. W. 801-804; *Stratton v. Commissioners' Court*, 137 S. W. 1170; *State v. Bank of Mineral Wells*, 251 S. W. 1107; *Texas Electric & Ice Co. v. City of Vernon*, 252 S. W. 255; *Jones v. Clark*, 250 S. W. 217.

In the case of *Buie v. Cunningham*, supra, Judge HEAD said:

> "The owners of the bonds should also have been made parties defendant. Without these the court would have no power to declare void the bonds held by them, as it attempted to do in the judgment rendered. This question is fully considered in the case of *Board v. T. & P. Ry. Co.*, 46 Tex. 316, approved in *Dwyer v. Hackworth*, 57 Tex. 251, and in the *City of Brenham v. German-American Bank*, 144 U. S. 178, 12 Sup. Ct. 559. We do not mean to hold that all of the defects in the petition above indicated are of a nature to be taken advantage of by general demurrer, but some of them—notably the failure to make the owners of the bonds sought to be cancelled parties—can be."

In the *Lowe v. City of Del Rio* case, supra, the Supreme Court said:

> "The record before us discloses that many of the holders of the bonds and warrants involved have not been made parties to this suit. We also find that such holders who were made parties have not been served with citation and have not answered. This suit being for the cancellation of the bonds and warrants issued by the City, the owners and holders of such bonds and warrants are necessary parties to a suit to cancel them." Many cases are cited in support of the holding.

Petitioners insist, however, that the bondholders were represented because the indenture trustees were defndants and the plaintiffs are in privity with them, but the plaintiffs are not in privity with the trustees. The meaning of the word privity precludes any such holding, and the court in the *Harris v. Flato* case held to the contrary, as hereinbefore shown, at the instance of the trustees. Petitioners appeal to equity, and yet they seek to avail themselves of acts of the trustees, and at the same time repudiate their acts in getting the court to hold they could not represent the plaintiffs.

In support of the contention that the trustees were not in privity with the bondholders, we cite: *C. J.* 50, Sec. 3, p. 407; *Ladonia State Bank v. McDonald*, 7 S. W. (2d) 161, and cases therein cited; *Howell v. Bartlett*, 19 S. W. (2d) 104, and cases therein cited.

The trial court based its findings of privity on Sec. 6, of Article 10 of the deeds of trust (R. 795), which does not deal with suits to cancel bonds, and at the instance of the trustees it was held that they did not represent the bondholders in the Flato suit, notwithstanding Harris pleaded the very provision now relied on by plaintiffs. (R. 97, at bottom of page.)

Petitioners cite no Texas case in which exceptions such as those here involved were sustained prior to the general demurrer, in which effect is given to the sustaining of the demurrer as going to the merits.

The New York case of *Sheldon v. Edwards*, 35 N. Y. 279, so strongly relied on by petitioners, was one in which both pleas were submitted in the answer upon the merits of the case, and not, as petitioners say, separate rulings upon the merits and upon plea in abatement. In that case the court recognized that a different rule would apply as to facts herein involved because it said that if the preliminary issue involved the nonjoinder of parties, other questions might be presented in a subsequent action that were not in the case.

Here the question did not arise upon a general demurrer alone, but even if it had if there were two grounds, one of nonjoinder or want of capacity, and the other going to the merits, it would be presumed that the decision rested upon the nonjoinder or want of capacity. BIGELOW on *Estoppel*, p. 121.

The Texas cases cited by petitioners are cases dealing with general demurrers and special exceptions going to form, and not to misjoinder, nonjoinder, want of capacity, etc. In such cases the demurrer was sustained first, while here the exceptions were sustained first. It is true, and many cases are cited by petitioners to show it, that there may be two pleas to the merits involved, and the decision of each furnish ground for res judicata. Such cases do not militate against the rule that if there can be no hearing because of want of capacity, nonjoinder or misjoinder, there can be no adjudication.

If objection relating to abatement is apparent on the face of the petition it may be taken by exception instead of by

plea. *Tex. Jur.*, vol. 1, p. 155, Sec. 111, also p. 127, Sec. 92. *May v. Slade*, 24 Tex. 205; *Compton v. Stage Co.*, 25 Tex. Supp. 76. Such exceptions as go to matters in abatement should precede the general demurrer and general denial. *Compton v. Stage Co.*, supra.

In the case of *Rushing v. Mayfield Co.*, 104 S. W. (2d) 619-622, a plea of res adjudicata had been called "a plea in abatement." The Court of Civil Appeals held it was a plea in bar, and that therefore the court presumably passed on the general demurrer first. Judge FUNDERBURK said:

> "If the plea denominated 'plea in abatement' was such, in fact, in the sense that a failure to interpose it in the due order of pleading would constitute a waiver thereof, then the court by sustaining it and abating the suit by that very action deprived itself of jurisdiction to pass upon the general demurrer. Manifestly the court had no power to adjudge in response to a general demurrer that plaintiff's petition was insufficient to state a cause of action in a suit which had already been abated."

The Supreme Court reversed this judgment but did not question the correctness of the quoted part of the opinion.

In the *Bomar v. Parker* case, 4 S. W. 599, quoted from by petitioners, it was held that it must clearly appear that the demurrer went to the merits of the action or defense, otherwise it would be presumed that the objection went to form, and not to the merits. In this case the special exceptions sustained speak for themselves. The court by sustaining them granted prayers to dismiss because of misjoinder, nonjoinder, want of capacity and laches at least, and the general demurrer could have been sustained on nonjoinder of bondholders as held in the case of *Buie v. Cunningham*, 29 S. W. 801-804, and certainly could have been sustained

because of want of capacity to sue, which involved want of capacity to recover.

The case of *Nickelson v. Ingram*, 24 Tex. 631, was one in which it was denied that the claimed sole creditor applying for administration was in fact a creditor, and a judgment of the District Court was pleaded to establish that the claim had been held unfounded. The Court in stating the case said:

> "The defendants demurred to the petition, and set forth the following causes of demurrer, to-wit: 1st. That there was a misjoinder of parties defendant. 2d. That the petition showed that the maker of the note was a married woman, and did not state a case within the exception of the statute, in which a married woman could make a valid contract. 3d. That the said claim had not been sworn to, and presented for acceptance before suit brought, as required by law. 4th. That the petition set up a claim against the heir of the intestate, and set up the same claim as an individual debt of one of the defendants. 5th. That it sought to make the defendant, J. L. Nickelson, liable on a contract not made by him in person, or by his agent for him."

The demurrer was sustained.

The Supreme Court in its opinion held:

> "The suit which Mrs. Ingram and her husband instituted in the district court, against John L. Nickelson and Clara Margaret Nickelson, went off on demurrer. The effect of the judgment in that suit, was not to declare that the claim sued on was an invalid claim but merely to declare that the suit could not be maintained in the form in which it was then presented to the court, and against the parties then sued."

Surely the *Flato* case is a much stronger example of no adjudication on the merits, the exceptions going to mis-

joinder, nonjoinder of necessary parties, want of capacity on plaintiff's part, and laches on his part, having been presented and sustained before the general demurrer was reached.

The rule in Texas is that action on a general demurrer which does not of necessity determine the merits constitutes no bar to a subsequent action. 26 *Tex. Jur.*, Secs. 388-397, pp. 87-88. *Philipowski v. Spencer*, 63 Tex. 604-607; *Cavanaugh v. Cavanaugh*, 238 S. W. 1023; WELLS, *Res Judicata*, Sec. 466. In *Cavanaugh v. Romberg*, 247 S. W. 909, the court says that action on the general demurerr was not res judicata, employing this language:

> "Sustaining the general demurrer in a former action was not res adjudicata of the question of granting a temporary restraining order in this case. All that was adjudicated in the former case was that appellant had not alleged a cause of action. All that is shown by the finding was the appellant sought the same relief. The other grounds given by the judge for denying the order we deem well taken."

The language employed in *Murray v. City of Pocatello*, 226 U. S. 318, is apt here:

> "A defense mainly relied upon was res judicata. In 1909 the city brought a bill of equity in the circuit court, seeking to have the court fix reasonable rates. The defendant demurred for want of jurisdiction to give relief in equity and multifariousness. The decree was that the demurrer be sustained and the bill dismissed. The dismissal was in general terms, but with a reference to the opinion, reported in 173 Fed. 382. In the opinion, it is true, the court expressed the view that the ordinance relied upon by the defendant was not affected by the subsequent statute, but the point decided, and the only point that could be decided, was that the demurrer should be upheld, and that the court was without juris-

> diction. The demurrer excluded a decision upon the merits, and even if the decree referring to it did not have the same effect by itself, the opinion to which the decree also refers would show the same thing. Of course, if the court was not empowered to grant the relief whatever the merits might be, it could not decide what the merits were. The two grounds are not on the same plane, as they were in *Ontario Land Co. v. Wilfong*, 223 U. S. 543, 559, L. Ed. 544, 551, 32 Sup. Ct. Rep. 328, and when jurisdiction to grant equitable relief was denied, the ground of the merits could not be reached."

Petitioners make much of the Court of Civil Appeals opinion wherein it is stated the appeal presents for review the ruling sustaining the general demurrer but the opinion among other things holds that Harris had no capacity to sue and was guilty of laches as well as overruling all of Harris' assignments of error, many of which were aimed at the rulings on the special exceptions.

Petitioners contend that an adjudication may take place between coparties, and imply that such an adjudication might exist as between the City and the trustee defendants. The answer is that no judgment was entered as between them, and no issues were made by either against the other by pleadings.

As to the effect of judgment between coparties, *Tex. Jur.*, vol. 26, Sec. 460, p. 232, lays down the following rules:

> "The general statement, so frequently found in the decisions, that a judgment is binding upon the parties to the suit in which the judgment was rendered is, as a matter of fact, too broad, because a judgment is usually binding only in respect to adversary parties. In other words, a judgment for or against two or more joint parties does not ordinarily determine their respective rights as between themselves, and they may neither rely

upon it in regard thereto nor assail it, in any subsequent litigation between them, unless they filed cross-pleadings putting such rights in issue and the judgment adjudicated them."

In the case of *James v. James*, 164 S. W. 47, the Court said:

" 'Parties to a judgment are not bound by it in a subsequent controversy between each other, unless they were adversary parties in the original cause of action.' Freeman on Judgments, Sec. 158. See also, Van Fleet's Former Adjudication, p. 569; *G., C. & S. F. Ry. Co. v. G., H. & S. A. Ry. Co.*, 83 Tex. 509, 18 S. W. 956; *Sandoval v. Rosser*, 26 S. W. 932."

Petitioners make the broad contention that a judgment between parties is conclusive of every matter which the parties might have litigated as against each other. This is not correct. Our courts recognize modifications as to this doctrine, 26 *Tex. Jur.*, Sec. 419, p. 137; *Moore v. Snowball*, 98 Tex. 16. The adjudication must be upon issues made by the pleadings of the parties or necessarily involved in such issues as are pleaded.

Petitioners say that the facts involved in *Louis v. Brown Township*, 109 U. S. 162, were almost identical with those in the case at bar. That is an error because the opinion shows that the codefendant filed a cross-bill raising an issue between himself and the trustee which was expressly decided. Here neither the trustees nor the City filed a cross action, nor was there any adjudication as between them.

Petitioners rely upon the case of *Corcoran v. Chesapeake, etc., Canal Co.*, cited page 22 of their petition, but it appears from that case that it was only held that if codefendants have had a hearing and an opportunity of asserting their rights, they are concluded between themselves so far as the

judgment affects rights presented to the court and passed upon by its decree. It is obvious that that case cannot aid petitioners. They also cite the case of *Gordon v. Thorpe*, 53 S. W. 357. Gordon sued the City and Thorpe for the title to land. The city alleged it had conveyed the title to Thorpe and sought a judgment for foreclosure of its vendor's lien for the purchase money. Thorpe defeated Gordon's claim for the land. It was held that the City had conveyed the land to Thorpe and that this was binding on a creditor of the City who subsequently levied an execution upon the land as the property of the City. It is evident that the case cannot aid petitioners. It merely recognizes that the pleadings of codefendants in a suit may bind them as to each other when judgment has been rendered thereon.

The case of *Carnes v. Carnes*, 26 Tex. Civ. App. 610, 64 S. W. 877, cited by petitioners, has been examined. It does not support the contention made.

The case of *Souffront v. La Compagnie des Sucreries*, 217 U. S. 475, 54 L. Ed. 846, was one involving peculiar facts. Under the Spanish law vendors of property after parting with property could sue for the benefit of the vendees. A judgment in such a suit was held binding upon the vendees in a subsequent suit. Certainly this case can have no application here.

The case of *City of Palestine v. City of Houston et al.*, 262 S. W. 215, so strongly urged by petitioners, is of no aid to them. It merely announces the rule that a judgment in a class suit, brought by a city and citizens to prevent a railroad from moving its general offices, is binding on all the citizens of the State, and not merely those of the county in which the suit was brought.

It is respectfully submitted that the criticism of the opinion of the Circuit Court of Appeals, wherein it uses the word dictum, is unwarranted. Certainly if the case was one which could not be heard on the merits on account of laches or want of capacity to sue, anything said about the merits was immaterial, and therefore dictum.

The doctrine of res adjudicata is after all only a rule of public policy of repose from continued litigation. It is not a rule designed to prevent a litigant from having his case heard on the merits. While it will bar a new trial of a case decided on the merits erroneously, it will not be invoked where its enforcement will produce manifest injustice. *Vann v. Bank*, 204 S. W. 1062, 1069. The bondholders eluded the jurisdiction of the State court. They now seek to say that although they were held to be not before the State court, they were in fact there. The previous case did not decide the merits of issues here involved.

The respondent respectfully submits there is no merit in petitioners' contention.

Reply to Point II.

The decision in *Radford v. City of Cross Plains* establishes the law in Texas to be that no water system can be encumbered without a vote for a sum in excess of $5,000.00 unless it be for purchase money of such system.

The opinion of the Court of Civil Appeals in the *Flato Case* was never approved by the Supreme Court. It dismissed the application for writ of error for want of jurisdiction. At that very time it had been considering the *Radford Case* for several months, and handed down its decision

a week after dismissing the *Flato Case*. If it had approved the opinion of the Court of Civil Appeals and found the bonds valid in the *Flato Case*, it would have refused the writ of error. By its action in dismissing for want of jurisdiction it refused to approve the opinion, and it seems to follow inevitably that such refusal was because it disagreed with the Court of Civil Appeals as to the validity of the bonds involved in the *Flato Case*.

The Supreme Court, under the statute, was not required to grant a writ if it found that on account of laches, or want of capacity on Harris' part to sue, or because of misjoinder or nonjoinder of necessary parties, the judgment of dismissal was correct. Nothing said in a motion for rehearing could change the legal effect of such action of the court.

Under Article 1111 the general power was given to mortgage the water, sewerage and gas systems, all or one, but under Article 1112 this would have to be done by vote, if exceeding $5,000.00, unless the debt was for purchase money of the system mortgaged. It was so held by the Supreme Court in the case of *Dayton v. Allred*, 68 S. W. (2d) 172, and this case was cited in the *Radford Case*. In that case it was undertaken to encumber the existing water system and the new sewer system for the price of the sewer system. This was held invalid as to the water system, and that therefore the bonds were void. In *McCann v. Akard*, 68 S. W. (2d) 1033, the Supreme Court Commission of Appeals held that a pledge of income is an encumbrance of the system, saying:

> "As we understand this record, the City owns and operates its own waterworks system. It is proposed by this contract to create a deed of trust lien on the net income of such system for $15,000.00. This lien is

> not for purchase money of such system, or to refund any existing indebtedness thereon, or for repair or reconstruction thereof. The proposition to create the lien on the waterworks system has never been authorized by a majority vote of the qualified voters of the City. Such a lien is prohibited by our statutes."

Petitioners seek to distinguish the *Radford Case* on the ground that the water system was encumbered to obtain a sewer system. What difference would that make when by virtue of Article 1111 and 1112 both systems could be encumbered by a vote, but without a vote no system can be encumbered except for its purchase money, unless there is an exception by reason of the amount being less than $5,000.00? Petitioners insist on calling the improvements and enlargements here involved "additional water powers," but the *Radford Case* and the *City of Hamlin Case* involved improvements practically identical in character. However, it is immaterial what they are called, as the then owned system cannot be encumbered to pay for such additions or improvements, if they exceed $5,000.00 in value.

It is sought to distinguish this case from the *Radford Case* on the ground that in that case, the City being plaintiff, and suing for cancellation of the bonds, disclaimed the improvements, while in this case the petitioners sued on the bonds, and the City defended on the ground that they were void, and did not tender to plaintiffs, who did not even hold all of the bonds, the improvements. All that the Supreme Court said in the *Radford Case* was:

> "We are not called on to decide whether or not the plaintiffs in error had a right to reclaim the reservoir and the pipe line which were constructed under the contract, as the city has made a disclaimer of any right or title to said property."

The Supreme Court did not hold that in an action at law, the void bonds could be held valid because of failure to tender improvements, nor did it even hold that the bondholders could recover the improvements, there being several Texas decisions to the effect that the contractor was the one who had such right. If the bonds are void under the *Radford Case*, the Circuit Court of Appeals was correct in so holding, and it was also correct in holding that in this case the City could not be denied its legal defense, because of any failure to tender improvements to part of the bondholders, who pleaded no willingness to rescind, and no alternative demand.

Reply to Point III.

The City of Corpus Christi, being sued in an action at law, was not estopped to set up that the bonds were void notwithstanding that it did not tender to plaintiffs the improvements constructed by Smith Brothers, Inc.

The rulings of the trial court in sustaining the contention that the City was estopped to rely on its legal defense because it had received and retained the benefits of the void contract finds no support in the Texas decisions, and we believe no support in any decisions anywhere. Such rulings violated the fundamental rule that if a contract is void no recovery thereon can be had if the action is defended on that legal defense.

The Texas courts permit a recovery on quantum meruit, which is contrary to the decisions of the Federal courts and wholly illogical, as it is making a contract for the parties. Such was the *Sluder v. City of San Antonio* case quoted from by petitioners. This was not a suit on quantum meruit, so all such cases may be disregarded.

In the *Radford v. Cross Plains* case, 86 S. W. (2d) 204, the court said:

> "These bonds having been issued without a vote of the people, in direct contravention of the statutes, were void. As the City not only had no authority to issue same without a vote of the people, and as they were issued in violation of law, the City was not estopped to question their validity. Citizens Bank v. City of Terrell, 78 Tex. 450, 14 S. W. 1003."

In *Citizens Bank v. Terrell,* 14 S. W. 1003, the court said:

> " * * * When the debt is void in its inception for want of authority to create it, no subsequent ratification of it by the collection of taxes, or otherwise, can give to it any validity; nor can there then be such a thing as a bona fide holder of the obligations, with a right to collect them, notwithstanding the want of power in the City to create the debt."

In the case of *Southwestern Lloyds vs. City of Wheeler,* 109 S. W. (2d) 739, involving the validity of certain city warrants, the Supreme Court Commission of Appeals held that there should be no estoppel allowed under the facts, although the city had retained and was still retaining the property and although the buyer of the warrants had been furnished a complete transcript, certified to by the City Secretary, purporting to show all proceedings necessary to valid warrant issues including a levy of tax and had accepted the warrants in payment upon the faith of such transcript and without actual notice of any infirmities.

In the case of *Grimes County v. W. L. Slayton & Co.,* 262 S. W. 209, the court said:

> " * * * Where there is a total want of power on

> the part of a county to issue bonds or refunding warrants, in virtue of constitutional or statutory restriction, the county will in no case be estopped from questioning and pleading such lack of power, even against a bona fide holder."

The petitioners rely upon two Texas cases. The case of *Hill County v. Bryant & Huffman*, 16 S. W. (2d) 513, was one in which an engineering firm which had received $13,000.00 too much under a contract in fact invalid sought to retain the excess by attacking the validity of the contract. The Court held that having received the benefit of the loan they were in no position to question its validity.

The Court referred to the action of the officials as ultra vires, but held that justice required the return of the money. It was not necessary to, and the court did not, sustain the validity of the contract in order to recover back the money.

The case of *Payne v. First National Bank of Columbus*, 291 S. W. 209, was one in which estoppel was based upon extraneous fraud as well as in the procedure by the City officers, and upon the fact that the City had the power and authority to build bridges, and by its fraud obtained the money for the warrants and used it to build a bridge. The facts were exceptional, and the case in no way commits the Texas courts to the proposition contended for by petitioners.

In the case of *City of Hamlin v. Brown Crummer*, 93 Fed. (2d) 680, it was expressly held that the bonds were nullities and "may not be recovered on." The Court also stated that since the City had disclaimed as to the property the bondholders had no equity on which to found a claim against the water system. The Court had rejected the estoppel theories urged in the case, and certainly did not hold

that the City was estopped by receiving benefits and afterwards changed such estoppel by disclaiming the property.

It is well settled that there is no requirement in a suit on the contract that a defendant tender the money or property acquired under an invalid contract to permit him to assert such invalidity as defense to a suit on the contract.

In addition to the cases cited there we submit the following:

3 McQuillin, Mun. Corp., 2d ed., Sec. 1283;
City of San Antonio v. McKenzie, 88 S. W. (2d) 622;
M.-K.-T. Co. v. Krumseig, 172 U. S. 358, 19 Sup. Ct. 182;
Pullman's, etc., Co. v. Central, etc., Co., 171 U. S. 138;
Columbus v. Mercantile Trust Co., 218 U. S. 145;
Carr v. Terminal Co., 150 N. E. 262;
McIver v. Clark, 10 Sou. 581 (Miss.).

In *Buchanan v. Litchfield*, 102 U. S. 278, the Court said:

> "Our attention is called by counsel to the exceeding hardship of this case upon those whose money, it is alleged, has supplied the City of Litchfield with a system of waterworks, the benefits of which are daily enjoyed by its inhabitants. The defense is characterized as fraudulent and dishonest. Waiving all considerations of the case in its moral aspects, it is only necessary to say that the settled principles of law cannot, with safety to the public, be disregarded in order to remedy the hardships of special cases.
>
> "Whether the City is under a legal obligation to make restitution of the money, obtained without authority of law, that is, to refund to the proper party or parties such sums as were actually received by its authorized agents or officers upon the sale of the bonds, is not a question arising in the present action, which is only for the recovery of the stipulated interest upon such bonds. Upon this point it is not proper at this time, or in this form of action, to express an opinion."

Apparently the petitioners had in mind the maxim that he who seeks equity must do equity. This doctrine does not apply to this case. In Sec. 153, 21 *Corpus Juris*, at p. 176, the writer says:

> "The maxim does not apply to cases where a party is not seeking to avail himself of the ordinary equitable jurisdiction of the court, but is seeking to avail himself of a substantial right under the express provisions of a statute * * *. Defendant may rely upon a legal defense, without reference to the maxim, and, if such defense is established is entitled to prevail."

It is thus held that where a defendant does not seek any affirmative equitable relief he does not have to offer to do equity.

In the case of *Hernin v. City of Coquille*, 21 Pac. (2d) 1078, the Supreme Court of Oregon had before it a case in which the pleadings were similar to those here involved. The court held the plea of estoppel to be without merit and sustained the legal defenses to the contract.

In *Cameron County Water Improvement District v. De la Vergne Engine Company*, 93 Fed. (2d) 373, Judge HOLMES says:

> "The appellee relies strongly upon ratification and estoppel, but neither may be invoked to enforce a contract entered into in violation of a constitutional provision which was intended to safeguard taxpayers against such financial difficulties as now envelop this improvement district * * *. No vote of the taxpayers having authorized the indebtedness, the contract is a nullity, because opposed to the Constitution, laws and settled public policy of the State. Complete performance of the contract by appellee does not prevent the district from pleading its want of power to enter into the contract or the illegality of its terms."

This but reiterates a doctrine well recognized by both the Supreme Court of the United States and the well considered Texas cases.

In this case the bondholders do not even own all the outstanding bonds. They have not pleaded any alternative demand seeking to recover the property; nor do they seek rescission. The City stands upon its legal defense to the bonds, and has no cross action seeking equitable relief.

It is respectfully submitted that the City was not precluded from defending on the ground of invalidity of the bonds, by reason of its having failed to make some kind of an offer to plaintiffs as to property or benefits.

Reply to Point IV.

The bonds were issued in violation of the statutes and were void and the City was not estopped to dispute their validity. In holding that the bonds were void the Circuit Court of Appeals followed its decision in the case of *City of Hamlin v. Brown Crummer Co.*, 93 Fed. (2d) 680, certiorari denied 303 U. S. 664. The improvements involved in that case were so strikingly similar to those involved in this case that no distinction can be made or is undertaken to be made with regard thereto. Petitioners seek to escape the effect of the decision in the case of *City of Cross Plains v. Radford* by reason of the fact that in such case the water system had been encumbered for improvements to the water system and sewer system but the construction placed by the Court upon Articles 1111 and 1112 of the statutes was not based on the fact that the improvements were to the two systems. The Court held that the power of the City to do what it attempted to do was limited to the accomplishment

of the objects expressly mentioned in Article 1111 and that there was the further limitation that the system could not be encumbered without the vote of the people except for extensions; that Article 1112 precluded the encumbering of any system already owned by the City except for purchase money of such system unless the encumbrance was for less than $5,000.00 or for extensions. In this connection respondent shows that the statute involved in the case at bar is the same as it was at the time of the transactions in the *Radford Case*. The question also obtained in this case whether the amendment to such statute providing for extensions was a valid one but since petitioners do not contend in this case that the improvements constituted extensions, it became unnecessary to present or argue the effect of the amendment to the statute which was considered in the Radford case. In the Radford case, the Court discussed the case of *City of Dayton v. Allred*, 123 Tex. 60, 68 S. W. (2d) 172, and approved the holding there made. These two cases, together with the case of *McCann v. Akard*, 68 S. W. (2d) 1033, definitely settle the law in Texas to be that Article 1112 prohibits the encumbering of a system or the income therefrom except for purchase money of such system or for one of the excepted purposes not involved in this case.

The contention of estoppel by recitals in the bonds was expressly denied in the *Hamlin Case* and was also denied in the *Radford Case*. It is not deemed necessary to reply further to the petition than to say that none of the matters relied upon for estoppel have any application in a case like the one at bar where the bonds were issued contrary to the provisions of the statute.

CONCLUSION

Petitioners, like all other holders of bonds, consider it a miscarriage of justice if they are not permitted to collect the bonds regardless of their legality. They wholly overlook the rights of taxpayers of a municipality to be protected from violation of the provisions of the laws of the State and the injustice of imposing obligations on the people of the city without their consent. The Circuit Court of Appeals in this case has applied the safeguards of the law and no miscarriage of justice has resulted.

The City of Corpus Christi respectfully prays that the petition for certiorari be denied.

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